No. 02-403

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

CHRISTINE BEAUMONT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Despite their repeated invocation of stare decisis, respondents' position is out of step with more than a quarter-century of this Court's campaign-finance jurisprudence. In arguing that the prohibition on direct contributions by "any corporation whatever" (2 U.S.C. 441b(a)) is unconstitutional as applied to respondent North Carolina Right to Life, Inc. (NCRL), respondents urge the Court to disregard the basic distinction that it has repeatedly drawn between the regulation of independent election expenditures and campaign contributions, and the rationale of *FEC* v. *National Right to Work Committee* (*NRWC*), 459 U.S. 197 (1982). But respondents provide no persuasive reason for the Court

to uproot its case law, much less to second-guess a legislative judgment that the Court has long accepted concerning the need for "prophylactic measures" (*id.* at 210) to insulate federal elections from the fact or appearance of corruption associated with corporate contributions.

A. Respondents' Position Cannot Be Squared With This Court's Existing Precedents

1. Respondents urge (Br. 18) this Court to give "stare decisis respect" to *FEC* v. *Massachusetts Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238 (1986), but at the same time show scant respect either for the foundation on which *MCFL* is built or the Court's specific statements in *MCFL* limiting its holding and distinguishing prior precedent. In *MCFL*, this Court held that Section 441b's prohibition on independent *expenditures* violates the First Amendment as applied to a nonprofit advocacy corporation. The FEC has not challenged in this Court the court of appeals' fact-specific finding that NCRL qualifies for the exemption created by *MCFL* with respect to independent expenditures. But the fact that NCRL is exempt from the prohibition on independent expenditures does not lead to the conclusion that it is entitled to a First Amendment exemption from Section 441b's prohibition on direct campaign contributions. See Gov't Br. 21-23.

In *MCFL*, the Court took care to square its decision with the Court's unanimous decision four years earlier in *NRWC*. See *MCFL*, 479 U.S. at 259-260. In *NRWC*, the Court upheld an FEC determination that a nonprofit advocacy corporation violated Section 441b by soliciting funds from nonmembers to make campaign contributions through a PAC. 459 U.S. at 201-206. In so holding, however, the Court in *NRWC* carefully

examined the prohibition on direct *contributions* by corporations. *Id.* at 208-210. In doing so, the Court not only emphasized that Congress's judgment as to how "to account for the particular legal and economic attributes of corporations * * * warrants considerable deference," but also "accept[ed]" Congress's judgment that the "potential" for corruption in this context justifies Section 441b's prohibition on contributions by all corporations—including corporations, like the non-profit advocacy corporation in *NRWC*, "*without* great financial resources." *Id.* at 209-210 (emphasis added).

Led by the Chief Justice, the four dissenting Justices in *MCFL* argued that *NRWC* foreclosed any "effort to carve out a constitutional niche for '[g]roups such as MCFL.'" *MCFL*, 479 U.S. at 271 (dissent); see *id.* at 268-271. As respondents note (Br. 31), the dissenting Justices questioned whether the differences between expenditures and contributions were sufficient to distinguish *NRWC*. The Court's response was an analytical lynchpin of the *MCFL* decision. The Court explicitly acknowledged *NRWC*, noted that "the political activity at issue in [*NRWC*] was *contributions*," and explained that the Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on *independent spending*." *Id.* at 259-260 (emphases added). Moreover, the Court explicitly *reaffirmed* the rationale of *NRWC*: "In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in [*NRWC*]." *Id.* at 260. But, given the heightened First Amendment interests involved in independent expenditures, the Court concluded that "the desirability of a broad prophylactic rule cannot justify treating alike [all

corporations] in the regulation of *independent spending*." *Ibid.* (emphasis added).

2. Respondents' attempts to distinguish *NRWC* are unavailing. Respondents acknowledge (Br. 32 n.20) that "[t]his Court in *MCFL* distinguished *NRWC* on the handy point that *NRWC* had dealt with contributions, while *MCFL* dealt with independent expenditures." But that distinction was not simply "handy." It is one of the central tenets carved by the past quarter-century of this Court's campaign-finance jurisprudence. See *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-443 (2001); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-389 (2000); *Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 610 (1996); *MCFL*, 479 U.S. at 259-260, 261-262; *FEC* v. *National Conservative Political Action Comm.* (*NCPAC*), 470 U.S. 480, 495-496 (1985); *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 196-197 (1981); *Buckley* v. *Valeo*, 424 U.S. 1, 20-22 (1976) (per curiam). Furthermore, as explained (Gov't Br. 15-16), that distinction is supported by the fact that (1) limits on independent expenditures "impose significantly more severe restrictions on protected freedoms of political expression and association" than limits on contributions, and (2) independent expenditures do not present the same inherent threat of corruption as contributions. *Buckley*, 424 U.S. at 23; see *Nixon*, 528 U.S. at 386-389.[1]

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[1] In the particular context of *MCFL*-type corporations, limits on expenditures may prevent individuals who individually could not afford to finance a particular form of election speech from pooling their assets to do so. In the contribution context, the ability to pool resources does not enable individuals to make contributions they could not otherwise make, except to the extent that they circumvent limits on individual contributions. See *infra*.

Respondents acknowledge the "broad language * * * used in *NRWC*" (Br. 26 n.17) in discussing the constitutionality of the prophylactic ban on direct contributions by corporations (see *NRWC*, 459 U.S. at 208-210), but nonetheless maintain that the Court's discussion in *NRWC* does not apply to nonprofit advocacy corporations like respondent NCRL. That is incorrect. The nonprofit advocacy corporation in *NRWC* was analogous to the one in *MCFL*, see *MCFL*, 479 U.S. at 269 (dissent), and thus to NCRL. Moreover, both *NRWC* and this Court's subsequent decisions, including *MCFL*, directly refute respondents' narrow reading of *NRWC*. See *NRWC*, 459 U.S. at 210 (recognizing that Section 441b's prophylactic rule against contributions applies to "corporations * * * *without* great financial resources") (emphasis added); *NCPAC*, 470 U.S. at 500 ("In *NRWC* we rightly concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, *membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit.*") (emphasis added); *MCFL*, 479 U.S. at 260 (acknowledging *NRWC*'s endorsement of "a broad prophylactic rule" for contributions); *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990) (discussing *NRWC*).

Adopting respondents' reading of *NRWC* would do violence to the Court's case law. In particular, it would require the Court to disregard the key distinction that it drew in *MCFL* with respect to *NRWC*, 479 U.S. at 259-260; to disavow its decision in *NRWC* to "accept" Congress's judgment that a broad prophylactic rule against corporate contributions is justified by the threat of actual or apparent corruption, 459 U.S. at 210,

and its reaffirmance of the rationale of *NRWC* in subsequent decisions such as *NCPAC*, 470 U.S. at 500, *MCFL*, 479 U.S. at 260, and *Austin*, 494 U.S. at 661; and to unravel decades' worth of precedent distinguishing between the regulation of campaign contributions and independent expenditures, see p. 4, *supra*. Yet respondents have not come close to establishing the sort of "special justification" that this Court requires before undoing its precedents, *United States* v. *IBM*, 517 U.S. 843, 856 (1996); see *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997); Resp. Br. 33-34, and there is no basis for the Court to depart from, much less overturn, its prior precedents here.[2]

3. Nor is there any reason for this Court to abandon its differential treatment of expenditures and contribution limits. Respondents argue (Br. 13) that "strict scrutiny is required" in this case. The Court does apply strict scrutiny to restrictions on election expenditures. See *Austin*, 494 U.S. at 657; *Buckley*, 424 U.S. at 44-45. But, as the Court reiterated just three Terms ago in rejecting the application of strict scrutiny to contribution limits, "under *Buckley*'s standard of scrutiny, a contribution limit involving 'significant interference' with associational rights could survive if the

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[2] Respondents' own amici acknowledge "this Court's prior acceptance of Congress' 'corruption' rationale for prohibiting campaign contributions by corporations," but argue that such acceptance "should be re-evaluated" in light of the Court's decision last Term in *Republican Party* v. *White*, 122 S. Ct. 2528 (2002). Br. for Amici RealCampaignReform.Org, Inc. *et al.*, 5. *White*, however, did not involve any challenge to a contribution or even expenditure limit, and the Court accordingly did not discuss the principles or precedents concerning the regulation of corporate campaign contributions. Nothing in *White*, therefore, sanctions the sort of reevaluation urged by amici in this case.

Government demonstrated that contribution regulation was a means 'closely drawn' to match a 'sufficiently important interest.'" *Nixon*, 528 U.S. at 387-388 (citation omitted; quoting *Buckley*, 424 U.S. at 25). Indeed, in *MCFL*—the case on which respondents principally rely and to which they urge continuing adherence—the Court specifically stated that "[w]e have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." 479 U.S. at 259-260.[3]

Respondents suggest (Br. 16) that "the nature of the organization," not the nature of the political activity, is the "analytical key" to this case. But this Court's precedents, including *MCFL* itself, reject that analysis. The "nature of the organization" in *MCFL* was comparable to the one in *NRWC*—both were "nonprofit corporation[s] without capital stock, formed to educate

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[3] Respondents suggest (Br. 14) that the fact that this case involves a prohibition, rather than a limit, on contributions itself calls for strict scrutiny. To begin with, Section 441b does not establish an absolute ban on corporate contributions because corporations may still contribute through a PAC. See Gov't Br. 30; see also *MCFL*, 479 U.S. at 252 (recognizing that because of possibility of expenditures through a PAC, Section 441b's expenditure provision "is not an absolute restriction"); *Austin*, 494 U.S. at 660. In any event, the key distinction drawn by this Court's cases is not between limits and bans, but rather focuses on the different expressive activity involved in making contributions and making independent expenditures. See *Nixon*, 528 U.S. at 386-389. In *MCFL*, in the particular context of Section 441b, the Court emphasized that the restriction on contributions at issue in *NRWC* was subject to a less demanding inquiry than the restriction in *MCFL* on independent expenditures. See *MCFL*, 479 U.S. at 259-260. And both *MCFL* and *NRWC* involved Section 441b's *prohibition* on direct election activities by corporations, subject to the ability of corporations to conduct such activities through PACs.

the public on an issue of perceived public significance." *MCFL*, 479 U.S. at 269 (dissent). Yet in *MCFL* the Court specifically distinguished *NRWC*, explaining that "the *political activity* at issue in [*NRWC*] was contributions," not independent expenditures, and that "restrictions on contributions require less compelling justification than restrictions on independent spending." *Id.* at 259-260 (emphasis added).

B. Respondents Provide No Reason To Second-Guess Congress's Judgment As To The Need For A Prophylactic Rule

Treating this case as if the Court were working off a blank slate, respondents urge this Court to reject Congress's determination to adopt a broad prophylactic rule barring contributions by all corporations, including nonprofit advocacy corporations. See Br. 18-29. But that legislative judgment is entitled to as much respect today as it was when the Court accepted it in *NRWC*.

1. In addressing the potential for corporate corruption of the political process, Congress historically has treated all who choose to take advantage of the benefits of the corporate form alike. The Congress that first enacted the prohibition on corporate contributions in 1907 rejected "bills prohibit[ing] political contributions by *certain classes* of corporations," and instead adopted a broad prophylactic rule prohibiting contributions by "*any* corporation *whatever*." *United States* v. *Automobile Workers*, 352 U.S. 567, 573, 575 (1957) (emphases added); Gov't Br. 12-13. Although Congress has several times amended the campaign-finance laws, including recently in the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, not

once has it seen fit to tinker with that prophylactic rule.[4]

2. Respondents object (Br. 19 n.12) that there is "no factual evidence of corruption to the political system by NCRL or any other *MCFL*-type corporation." But just as in *NRWC*, the absence of "factual evidence of corruption" in the record of this case in no way casts doubt on the validity of Congress's time-honored "legislative determination as to the need for prophylactic measures where corruption is the evil feared." *NRWC*, 459 U.S. at 210; see *Nixon*, 528 U.S. at 391 n.5 (citing *NRWC*).[5]

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[4] Congress is presumed to mean what it said in applying its prohibition on contributions to "any corporation whatever," and to be aware of this Court's decisions such as *NRWC* recognizing that that prohibition applies to nonprofit advocacy corporations. In addition, Congress is certainly aware of Section 441b's application to nonprofit advocacy groups. For example, one of the corporations studied by Congress in enacting the Taft-Hartley Act in 1947 was American Action, Inc., which was a Delaware corporation that "claim[ed] to be motivated by patriotic purposes and to seek no personal gain" and, under the Federal Corrupt Practices Act, was "prohibited from making any contributions in connection with any election at which a Representative to Congress is to be chosen." *Report of Special Comm. to Investigate Campaign Expenditures*, H.R. Rep. No. 2739, 79th Cong., 2d Sess. 42-43 (1946). Likewise, during the floor debate on the 1947 amendments to the Federal Corrupt Practices Act, Senator Taft confirmed that the Act's prohibition on contributions applied to corporations that are not established for economic gain. 93 Cong. Rec. 6440 (1947). So too, in enacting the Federal Election Campaign Act of 1971, Congressman Hanson noted that the prohibition on contributions applied to nonprofit corporations such as the National Association of Manufacturers and the American Medical Association. 117 Cong. Rec. 43,380 (1971).

[5] Respondents' complaint as to the state of the record in this case is particularly unwarranted given that this Court's decisions already "accept" the validity of the prophylactic contribution rule

This Court has made clear that Congress's interest in protecting the integrity of federal elections extends beyond eradicating actual corruption to eliminating the appearance of corruption. Thus, in *Colorado Republican*, the Court emphasized that "political corruption" includes "not only *quid pro quo* agreements, but also * * * undue influence on an officeholder's judgment, and the *appearance* of such influence." 533 U.S. at 441 (emphasis added). See *Nixon*, 528 U.S. at 389 (Congress need not limit itself to the prevention of "*quid pro quo* arrangements," but instead also may respond to the "broader threat" created by "'improper influence' and 'opportunities for abuse.'"); *NRWC*, 459 U.S. at 210 ("The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized.").

Furthermore, as this Court recognized in *Buckley*, the coordination and consideration involved in making contributions directly to candidates is *inherently* likely to create political debts or at least the appearance of such debts. See 424 U.S. at 28 ("Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption *inherent* in a system permitting unlimited financial contributions.") (emphasis added); see also *NCPAC*, 470 U.S. at 497.

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challenged in this case. *NRWC*, 459 U.S. at 210. The FEC should hardly be faulted for not producing record evidence in this case to establish the validity of a prophylactic rule that this Court "accept[ed]" more than 20 years ago. *Ibid.* Moreover, requiring the FEC to prove actual corruption in every case before enforcing Section 441b's prohibition on contributions would place an unbearable strain on the FEC's limited enforcement resources.

So too, both Congress and this Court have long recognized that corporations—and "the particular legal and economic attributes of corporations," *NRWC*, 459 U.S. at 209—present a substantial threat with respect to such corruption. See *Austin*, 494 U.S. at 659-660. Indeed, the prophylactic rule against corporate contributions was first enacted on the heels of a well-known episode of corporate money corrupting federal elections. See *Automobile Workers*, 352 U.S. at 572-576. Although the most notorious examples in that period involved large corporations, see *id.* at 571, this Court has accepted Congress's judgment to adopt a prophylactic rule that applies to *all* corporations, including "corporations * * * without great financial resources." *NRWC*, 459 U.S. at 210; see *NCPAC*, 470 U.S. at 500.

3. Respondents claim (Br. 19) that "*MCFL*-type corporations pose no potential of threat to the political system." That claim is implausible and, in any event, provides no basis for overturning the legislative judgment at issue in this case.

a. While not organized for economic gain, nonprofit advocacy corporations nonetheless have funds to contribute to political campaigns. Indeed, large nonprofits may be able to amass political war chests simply by relying on contributions from members. See Brent Coverdale, *A New Look at Campaign Finance Reform: Regulation of Nonprofit Organizations Through the Tax Code*, 46 U. Kan. L. Rev. 155, 172 (1997) ("Large contributions from wealthy sources have * * * helped the Christian Coalition raise $21 million for its influential campaign activity"). These sums have been assembled even without the additional incentives, which would be created by respondents' proposed rule, to funnel money to nonprofits to avoid contribution limits. See *infra*. Moreover, nonprofits may—and, as this case

illustrates, do—accept money from business corporations. See Gov't Br. 5. Thus, as this Court recognized in *Austin*, 494 U.S. at 664, it is possible for nonprofit groups to "serve as a conduit for corporate political spending."[6]

Equally important, as respondents acknowledge (Br. 29), even with respect to smaller nonprofit advocacy corporations, the influx of campaign contributions that would almost certainly follow if this Court were to create the exception sought by respondents could create the reality or appearance of corruption in the case of candidates receiving numerous contributions from various nonprofit corporations. In that regard, the concern and certainly perception that candidates may be influenced by political donations is just as real when contributions come from nonprofit environmental groups that support *increased* emissions standards as when the contributions come from for-profit automobile manufacturers that support a *reduction* in those standards. Although respondents state (Br. 29) that "this case does not * * * involve a concern of systematic political corruption by the aggregation of many contributions from *MCFL*-type corporations," that concern

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[6] Indeed, lower courts have concluded that nonprofit advocacy corporations with significant financial resources from member as well as business funds may qualify for the *MCFL* exception with respect to independent expenditures, and thus qualify for the exemption urged by respondents in this case with respect to campaign contributions. See, *e.g.*, *FEC* v. *National Rifle Ass'n*, 254 F.3d 173, 192 (D.C. Cir. 2001) (holding that National Rifle Association qualified for *MCFL* exception with respect to independent expenditures in an election year in which it received "$1000 in corporate contributions" and "substantial revenues from corporate advertising in its magazines").

supports Congress's decision to adopt a broad prophylactic rule prohibiting contributions by *any* corporation.

b. Respondents' proposed rule also would create incentives for circumventing existing campaign-finance laws. For example, respondents' rule would create incentives for nonprofit advocacy corporations to proliferate because of the ease by which nonprofit corporations could be used to circumvent existing contribution limits, thus creating an entire new class of potential contributors and thus political debts. Those incentives, in turn, would undermine the integrity of the limits on individual contributions and enhance the likelihood that multiple, related groups could funnel substantial aggregated amounts to candidates. For example, if a national organization with 50 separately incorporated state offices could channel $100,000 to a candidate, that amount surely could create an "undue influence on an officeholder's judgment" (*Colorado Republicans*, 533 U.S. at 441), or at least the appearance of such influence. Moreover, enforcement efforts to determine whether nonprofit corporations are being used by members or others as devices for excessive individual contributions would be made more difficult because the distinguishing characteristic of a corporation is its separateness from the individual. See, *e.g.*, *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158 (2001). That is true for nonprofit corporations, as much as for-profit corporations. Indeed, respondents concede that the principal benefit of the corporate form for nonprofits is that the corporation is a distinct entity for liability purposes. See Resp. Br. 17-18.

Furthermore, by creating incentives for contributions to be funneled through nonprofit corporations, respondents' proposed rule will limit the efficiency of the federal registration and disclosure requirements

with respect to political contributions. To the extent that contribution disclosure reports identify nonprofit corporations formed in part to circumvent contribution limits, they will not meaningfully identify the true donors of campaign contributions by such nonprofits. The stringent disclosure rules designed to address this problem in the context of PACs do not apply to nonprofit corporations, see note 8, *infra*, and although additional disclosure requirements could be imposed on all nonprofit corporations, such requirements could affect the associational rights that respondents themselves seek to invoke.

Recognizing an exception for nonprofit advocacy corporations from Section 441b's prohibition on corporate contributions would also encourage evasion of the carefully crafted limits on contributions to PACs and minimize the role of PACs. See *California Med. Ass'n*, 453 U.S. at 182. This Court recently recognized the value of eliminating such incentives in the campaign-finance context in particular, where experience shows that money invariably flows to—and through—any potential loopholes in the law. See *Colorado Republican*, 533 U.S. at 465 ("[A] party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits."); see also *Austin*, 494 U.S. at 664 (recognizing that corporations may be used as a "conduit" for political spending).[7]

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[7] Recent experience leaves little doubt that, at least as a general matter, nonprofit advocacy groups have grown increasingly sophisticated and effective in seeking to influence elections through both permissible and, on occasion, impermissible means. See generally Robert Paul Meier, *The Darker Side of Nonprofits: When Charities and Social Welfare Groups Become Political Slush Funds*, 147 U. Pa. L. Rev. 971 (1999) (discussing abuses

c. At the same time, Congress may account for the fact that all corporations, including nonprofits, enjoy "special benefits conferred by the corporate structure." *Austin*, 494 U.S. at 661; see *ibid.* ("Although some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process."). For example, as this Court has recognized, the corporate form confers important limitations on the potential liability of nonprofit corporations and their officers and directors, offers perpetual life for such groups, and results in certain favorable tax treatment. See *Austin*, 494 U.S. at 658-659. In particular, nonprofit corporations such as NCRL that qualify under Section 501(c)(4) of the Internal Revenue Code enjoy an exemption from federal income taxation, which itself amounts to a valuable subsidy. See *Regan* v. *Taxation Without Representation*, 461 U.S. 540, 544 (1983) ("A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income.").

The Section 501(c)(4) tax exemption provides nonprofit groups with an infusion of "wealth that is taxpayer subsidized," and the exemption both produces "lower costs" and creates a desirable "'halo effect' of credibility for potential donors." Coverdale, *supra*, at 156; see *id.* at 161-162 (discussing benefits of tax-

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documented in connection with 1996 election cycle and recommending that nonprofit corporations be required to conduct their activities through PACs); Coverdale, *supra*, at 157 (concluding that the Federal Election Campaign Act "is ineffective at controlling the campaign activity of social welfare nonprofit corporations"); see also Br. of Amicus Public Citizen, Inc. *et al.*, 17-18.

exempt status). Moreover, as experience confirms, the tax exemption benefits nonprofit corporations seeking to influence elections or candidates. See *id.* at 181 ("The Internal Revenue Code allows [nonprofit] groups to accept unlimited contributions based upon the groups' tax-exempt status. These contributions become a political war chest as the groups use their resources to influence federal campaigns."); see also *id.* at 156 ("Groups seeking or granted this [tax exempt] status now include the Sierra Club, the National Rifle Association, Empower America, and the Christian Coalition, groups with notable political motivations.").

As this Court stated in *NCPAC*, "[i]n return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals." 470 U.S. at 495. Congress has permissibly determined that individuals who voluntarily choose to avail themselves of the benefits of the corporate form should be required to forgo the right to make political contributions directly through the corporation and instead—to safeguard the integrity of federal elections—be required to make contributions through a PAC or in their individual capacity.

C. Nonprofit Advocacy Corporations Such As NCRL Enjoy Ample Means To Engage In Political Advocacy

Respondents and their amici extol the role of advocacy groups in our political system and suggest that prohibiting such groups from making contributions to candidates for federal office threatens that role. See Resp. Br. 5-12; Br. for Amicus American Taxpayers Alliance 4-7, 17-18. But continuing to recognize the validity of Section 441b's prohibition on contributions by corporations poses no such threat.

The federal prohibition on direct political contributions "by any corporation whatever" has existed for nearly a century. See Gov't Br. 12-13 & n.5. Yet today the number and political influence of nonprofit advocacy groups has perhaps never been greater. See 3 *Senate Comm. on Governmental Affairs*, *Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns: Final Report*, S. Rep. No. 167, 105th Cong., 2d Sess. 3993 (1998) ("The 1996 election witnessed an unprecedented level of political activity by nonprofit groups."; "during the 1996 election cycle, nonprofit groups spent between 55 and 70 million dollars on political advocacy campaigns."); *Developments in the Law—Political Activity of Nonprofit Corporations*, 105 Harv. L. Rev. 1579, 1656 (1992) ("Nonprofit corporations play an increasingly prominent role in shaping American public opinion and in influencing public policy. Non-profit organizations such as the Sierra Club, the American Civil Liberties Union, and the National Rifle Association are perennial high-profile participants in political discourse.").

That is not surprising. As discussed (Gov't Br. 30-31), political advocacy groups such as respondent NCRL have numerous means, apart from making cash contributions to candidates, to propound their message. To begin with, as amici RealCampaignReform.Org, Inc. *et al.*, explain (Br. 22), "[n]onprofit advocacy corporations such as NCRL engage in a variety of press activities"—*e.g.*, "[t]hey publish news, editorials, and commentaries, to communicate to the public." The statutory prohibition at issue in this case has no impact whatever on the ability of advocacy groups to engage in such conventional First Amendment activities. See *Nixon*, 528 U.S. at 395 n.7 (contribution limits "leav[e] persons free to engage in independent political expres-

sion" and "to associate actively through volunteering their services") (quoting *Buckley*, 424 U.S. at 28).

More to the point, while prohibiting corporations from making contributions directly to candidates for federal office, federal law and this Court's decisions nonetheless permit nonprofit advocacy corporations such as NCRL to engage robustly in the electoral process. As the Court recognized in *NRWC*, Section 441b permits corporations to participate "in the federal electoral process by allowing them to establish and pay the administrative expenses of [a PAC]." 459 U.S. at 201. Although federal law (see 2 U.S.C. 433-434) requires PACs to register and make certain disclosures in order to protect the integrity of the electoral process, a PAC "may be completely controlled by the sponsoring corporation or union, whose officers may decide which political candidates' contributions to the fund will be spent to assist." 459 U.S. at 200 n.4. Respondent NCRL has itself established a PAC and made both expenditures and contributions in connection with federal elections through its PAC. See Gov't Br. 6.[8]

What is more, corporations that meet the requirements of the exception established by this Court in *MCFL* may engage in unlimited independent spending in connection with federal elections without even having to form a PAC, and thus enjoy a unique opportunity to participate in elections not shared by other

[8] One of the advantages of the PAC system is that registration and disclosure requirements allow Congress and the FEC to keep track of the individuals or separate segregated funds that contribute to PACs, and thus indirectly to federal campaigns. 2 U.S.C. 433-434. By contrast, there is no requirement that an *MCFL*-type corporation disclose all the sources of its funding, even in the case of large nonprofit corporations that may qualify for the *MCFL* exception in the case of election expenditures.

corporations. See Gov't Br. 30-31. After repeatedly criticizing the distinction between expenditures and contributions that underlies this Court's jurisprudence on campaign finance generally and in the corporate context in particular, see, *e.g.*, Resp. Br. 33-34, respondents belatedly acknowledge (*id.* at 42) that the two are not "fungible." To the extent that respondents note that independent expenditures allow groups to articulate a more nuanced message than the blunt "impl[ied] endorsement" (*ibid.*) communicated by a contribution, they are correct, and that is a principal reason for subjecting contribution limits to less demanding review under the First Amendment. To the extent that respondents suggest that contributions provide a unique form of endorsement in "symbolic identification" (*id.* at 43), there are more communicative ways to convey the same message. In particular, rather than relying on the endorsement *implied* by a contribution, nothing prevents an *MCFL* corporation from *expressly* endorsing its candidate of choice.[9]

In short, nonprofit advocacy corporations such as NCRL are prohibited by Section 441b only from directly making campaign contributions—the political activity that inherently presents the greatest threat of actual and apparent corruption and yet involves only a marginal expressive component. Congress has determined that the small burden imposed by the prohibition on such contributions is justified in light of the vital

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[9] Of course, in addition to the foregoing forms of political activity, the individual members of nonprofit advocacy corporations remain free to make their own contributions to candidates in accordance with federal limits, and nonprofit corporations may encourage their members to make such contributions in connection with particular candidates or campaigns.

importance of protecting the integrity of federal elections. This Court has previously "accept[ed]" (*NRWC*, 459 U.S. at 210) that legislative judgment. There is no reason to reach a different conclusion here.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed insofar as the court of appeals held that Section 441b's prohibition on direct corporate contributions is unconstitutional as applied to respondent NCRL.

Respectfully submitted.

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